

2002

# Cindy A. Busch v. Jay Busch : Brief of Appellant

Utah Court of Appeals

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Scott B. Mitchell; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

\* \* \* \*

CINDY A. BUSCH,

Petitioner/Appellee,

vs.

JAY BUSCH,

Respondent/Appellant.

\*

\* **APPELLANT'S OPENING BRIEF**

\*

\*

\*

\*

\* Case No. 20010789-CA

\*

\* Priority 15

\* \* \* \*

RESPONDENT'S APPEAL FROM FINAL ORDERS OF THE THIRD JUDICIAL  
DISTRICT COURT, THE HONORABLE BRUCE LUBECK PRESIDING

\* \* \* \*

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PUBLISHED DECISION REQUESTED

**FILED**  
Utah Court of Appeals

JAN 14 2002

**Paulette Stagg**  
Clerk of the Court

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### **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction over this appeal by virtue of Utah Code Ann. § 78-2a-3(2)(h).

### **STATEMENT OF ISSUE AND STANDARD OF REVIEW**

Whether the doctrine of res judicata barred the trial court from clarifying the nature of Mr. Busch's Utah state law obligation to pay the parties' second mortgage in light of the Bankruptcy Court's prior ruling with respect to the nature of that obligation for purposes of federal bankruptcy law. A trial court's determination of whether res judicata bars consideration of an issue presents a question of law reviewable for correctness. See *Macris & Associates v. Neways*, 2000 UT 93, 16 P.3d 1214. This issue was preserved in Mr. Busch's Objection to Commissioner's Recommendation. (R. 525-526)

### **DETERMINATIVE CONSTITUTIONAL PROVISIONS, ETC.**

There are no determinative constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative or of central importance to this appeal.

## STATEMENT OF THE CASE

### **I. Nature of the Case**

This is an appeal from final orders of the Third Judicial District Court of Salt Lake County denying Mr. Busch's Motion for Order Clarifying Nature of Obligation and overruling Mr. Busch's Objection to Commissioner's Recommendation.

### **II. Statement of Facts**

1. The trial of this action was held in December of 1999. (R. 133)

2. At trial, petitioner requested, inter alia, that respondent be ordered to pay the parties' second mortgage obligation as additional alimony. (R. 722 at p. 59, lines 5-7)

3. The Decree of Divorce was entered January 14, 2000. Therein, respondent was ordered:

a. "to pay child support in the sum of \$524.66 per month pursuant to the Utah Uniform Child Support Guidelines."

b. "to pay the Petitioner \$1,100 per month alimony for a term equal to the length of the marriage, which is thirteen (13) years and eleven (11) months from the date of entry of this Decree."

c. "Respondent will assume and pay and hold Petitioner harmless from ... the second mortgage on the parties' home."

(R. 141-145, paragraphs 4, 10 & 11)

4. There was no evidence presented nor any argument made at

trial, nor was there any finding of fact made by the trial court,

from which it would have been appropriate to order Mr. Busch to

pay the second mortgage as his share of the marital debt.

5. Petitioner Cindy Busch (hereinafter referred to by her new married name "Hancock") remarried in or around September 2000. (R. 466) Accordingly, respondent's alimony obligation terminated at that time in accordance with Utah Code Ann. section 30-3-5(8).

6. Respondent filed a Voluntary Petition for relief under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Utah on July 28, 2000. Ms. Hancock filed a proof of claim in the bankruptcy court in which, among other things, she claimed priority status for Mr. Busch's obligation to pay the parties' second mortgage. (R. 721 at page 13)

7. Mr. Busch objected to Ms. Hancock's proof of claim. Following hearings held March 13, 2001 and June 7, 2001, however, the bankruptcy court issued an oral ruling that, for purposes of federal bankruptcy law, Mr. Busch's



obligation to pay the parties' second mortgage is entitled to priority treatment as a debt in the nature of child support, but only until August 26, 2004, the parties' minor child's eighteenth birthday. (R. 721, Tab 1 at page 4, lines 7-9)

8. The parties' second mortgage is amortized over 30 years with a balloon payment due January 1, 2013. (R. 721, Tab 1 at page 2, lines 1-2)

9. On or about March 22, 2001, Mr. Busch filed a Motion for Order Clarifying Nature of Obligation in the case at bar in which he requested, inter alia, that the trial court clarify that for purposes of Utah state law his obligation to pay the second mortgage was in the nature of alimony which terminated upon Ms. Hancock's remarriage. (R. 465-467)

10. A hearing on Mr. Busch's motion was held before the Honorable Michael S. Evans on April 24, 2001. At the conclusion of the hearing, Commissioner Evans recommended that Mr. Busch's motion be denied because "[i]n view of [the bankruptcy court's] ruling it is the opinion of this Court that the issue now sought to be brought before this Court in Defendant's [sic] Motion is, in fact, Res Judicata because

of Judge Clark's [i.e., the bankruptcy judge's] ruling on the same issue." (R. 567-568)

11. Mr. Busch filed his Objection to Commissioner's Recommendation on May 2, 2001. (R. 525-526)

12. Following a hearing before the Honorable Bruce Lubeck on August 14, 2001, the trial court issued its Order on Defendant's [sic] Objection to Commissioner's Recommendation in which it overruled Mr. Busch's objection to Commissioner Evans' recommendation. (R. 690-691)

13. Mr. Busch timely filed his Notice of Appeal on September 26, 2001. (R. 692)

#### **SUMMARY OF ARGUMENTS**

In order for the issue preclusion branch of res judicata to have barred consideration of Mr. Busch's Motion for Order Clarifying Nature of Obligation the trial court was first required to "determine whether the issues actually litigated in the [bankruptcy court were] *precisely the same* as those raised in the present action." *Schaer v. State By & Through Utah Dept.*, 657 P.2d 1337, 1341 (Utah 1983) (quoting *Wilde v. Mid-Century Insurance Co.*, 635 P.2d 417, 419 (Utah 1981)) (emphasis original). Mr. Busch respectfully submits that the issue decided by the

bankruptcy court was substantially different from the one which he asked the trial court to decide in the case at bar.

The issue before the bankruptcy court was whether Mr. Busch's obligation to pay the parties' second mortgage was entitled to priority treatment as a debt in the nature of child support within the meaning of 11 U.S.C. §§ 507(a)(7) and 1322(a)(2). For purposes of sections 507(a)(7) and 1322(a)(2), the determination of whether an obligation arising under a Decree of Divorce is in the nature child support is a question of federal bankruptcy law regardless of the nature of that obligation under state law. *E.g., In re Sampson*, 997 F.2d 717, 722 (10<sup>th</sup> Cir. 1993).

The issue which Mr. Busch asked the trial court to decide in the case at bar, on the other hand, is whether his obligation to pay the second mortgage was intended to be in lieu of additional alimony which terminated upon Ms. Hancock's remarriage in accordance with Utah Code Ann. section 30-3-5(8).

Because the two issues are not "precisely the same," the issue preclusion branch of res judicata is not applicable. *Schaer*, 657 P.2d at 1341.

### ARGUMENT

**The issue decided by the bankruptcy court is not the same issue which Mr. Busch asked the trial court to decide in the case at bar.**

There are two branches to the doctrine of res judicata: claim preclusion and issue preclusion. *E. g., Macris & Associates, Inc. v. Neways, Inc.*, 2000 UT 93, ¶19, 16 P.3d 1214, 1219.

The basic difference between the two branches of res judicata is simply put: while "claim preclusion applies to *whole claims*" ... issue preclusion, or collateral estoppel, arises from a different cause of action and prevents parties ... from relitigating "particular issues that have been contested and resolved."

*Id.* at ¶34 (quoting 18 James Wm. Moore, *Moore's Federal Practice* § 131.13[1] (Matthew Bender, 3d ed. 2000)) (Supreme Court's emphasis). Mr. Busch believes it is clear that the case at bar involves the issue preclusion branch of res judicata and will limit his arguments accordingly.

In order for issue preclusion to have barred consideration of Mr. Busch's Motion for Order Clarifying Nature of Obligation the trial court was first required to determine "whether the issues actually litigated in the [bankruptcy court were] *precisely the same* as those raised

in the instant action."<sup>1</sup> *Swainston v. Intermountain Health Care*, 766 P.2d 1059, 1061 (Utah 1988) (quoting *Wilde v. Mid-Century Insurance Co.*, 635 P.2d 417, 419 (Utah 1981)) (emphasis original); see also *Schaer v. State By & Through Utah Dept.*, 657 P.2d 1337, 1341 (Utah 1983).

Mr. Busch respectfully submits that issue preclusion is not applicable in this case because the issue decided by the bankruptcy court was substantially different from the one which he asked the trial court to decide. The issue which Mr. Busch asked the trial court to decide is whether his obligation to pay the parties' second mortgage was intended to be in lieu of additional alimony which terminated upon Ms. Hancock's remarriage in accordance with Utah Code Ann. section 30-3-5(8). That is, of course, a question of state law. The issue before the bankruptcy court, on the other

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<sup>1</sup>The Supreme Court of Utah has established "a four-part test to determine whether the doctrine of issue preclusion is applicable: First, the issue challenged must be identical in the previous action and in the case at hand. Second, the issue must have been decided in a final judgment on the merits in the previous action. Third, the issue must have been competently, fully, and fairly litigated in the previous action. Fourth, the party against whom collateral estoppel is invoked in the current action must have been either a party or privy to a party in the previous action." *Macris*, 2000 UT 93, ¶37, 16 P.3d at 1222. Only the first part of this test will be addressed by Mr. Busch.

hand, was whether Mr. Busch's obligation to pay the second mortgage was entitled to priority treatment as a debt in the nature of child support within the meaning of 11 U.S.C. §§ 507(a)(7) and 1322(a)(2). The determination of whether an obligation arising under a Decree of Divorce is in the nature of child support is a question of federal bankruptcy law **regardless of the nature of that obligation under state law.** *In re Sampson*, 997 F.2d 717, 722 (10<sup>th</sup> Cir. 1993); *Matter of Biggs*, 907 F.2d 503 (5<sup>th</sup> Cir. 1990); and *Shaver v. Shaver*, 736 F.2d 1314 (9<sup>th</sup> Cir. 1984).<sup>2</sup>

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<sup>2</sup>In *Sampson*, the Tenth Circuit Court of Appeals recognized that

Congress, by directing federal courts to determine whether an obligation is "actually in the nature of alimony, maintenance, or support," sought to ensure that section 523(a)(5)'s underlying policy is **not undermined either by the treatment of the obligation under state law or by the label which the parties attach to the obligation. Thus, a debtor's lack of duty under state law to support his or her former spouse does not control whether an obligation to the former spouse is dischargeable in bankruptcy.**

997 F.2d at 722 (emphasis added); see also *Sylvester v. Sylvester*, 865 F.2d 1164, 1166 (10<sup>th</sup> Cir. 1989) ("While it is true that the divorce decree refers to the settlement agreement as a 'property settlement,' that label does not resolve the issue. The determination of whether an obligation arising out of a divorce settlement is in the nature of alimony, maintenance, or support is a matter of federal bankruptcy law"); *In re Goin*, 808 F.2d 1391 (10<sup>th</sup> Cir. 1987) ("bankruptcy courts are not bound by state laws

At the April 24, 2001 hearing on Mr. Busch's Motion for Order Clarifying Nature of Obligation Ms. Hancock acknowledged that the issue decided by the bankruptcy court is different from the one which Mr. Busch asked the trial court to decide:

THE COURT: ... how would you characterize [the nature of Mr. Busch's obligation to pay the second mortgage] then?

Mr. TYCKSEN: Your Honor, I believe if I were to try to characterize it from what this court would normally do, I couldn't do it because the, to call it child support [as the bankruptcy court did] would not be truthful. It isn't child support. To call it alimony would not be truthful either as this court would normally do. But in the application of Federal Law and Bankruptcy Law in that court as it's been applied over there, there are cases that say that if it has the effect of providing support to the family, i.e., maintaining a household with a dependent child and those kinds of things which is what the court found over there, then it is, in fact, [in the nature of child support and] not dischargeable.

(R. 721 at page 5, line 21 thru page 6, line 8)

---

that define an item as maintenance or property settlement, nor are they bound to accept a divorce decree's characterization of an award as maintenance or a property settlement"); *In re Yeates*, 807 F.2d 874 (10<sup>th</sup> Cir. 1986) (same); and *In re Dewey*, 223 B.R. 559 (10<sup>th</sup> Cir. BAP 1998) (same).

The *Swainston* case<sup>3</sup> is also instructive. At issue in that case was IHC's successive motions to disqualify the firm of Howard, Lewis & Peterson from representing plaintiffs in two cases against IHC. Similar to the case at bar, *Swainston* involved a federal court action, *Bodily v. IHC*, and two Utah state court actions, *Wilson v. IHC* and *Swainston* itself. Unlike the case at bar, the *Swainstons* were not parties to either *Bodily* or *Wilson*. The Howard firm represented the plaintiff in *Bodily*, but had represented IHC in *Wilson*. IHC contended that this simultaneous representation of adverse parties constituted a violation of Canon 5 of the Utah Code of Professional Responsibility. In *Bodily*, the federal court denied IHC's motion to disqualify on the merits. In *Swainston*, the Fourth District Court denied IHC's subsequent motion to disqualify ruling that "IHC was collaterally estopped from litigating its motion because a similar motion had previously been litigated in a case in federal court." 766 P.2d at 1059. IHC appealed from the Fourth District's ruling arguing that "the state court was not bound by the

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<sup>3</sup> *Swainston v. Intermountain Health Care*, 766 P.2d 1059, 1061 (Utah 1988).



federal court's ruling on the disqualification motion because the federal court decision relied on federal, not state, law." 766 P.2d at 1060. The Supreme Court agreed and reversed, explaining as follows:

We must determine 'whether the issues actually litigated in the first action are precisely the same as those raised in the instant action.' [citations omitted] In *Bodily*, the relevant question was whether the outcome of the case would be affected by the Howard firm's involvement in *Wilson*. In the present action, the relevant question is whether *the present action* has been affected or prejudiced by the Howard Firm's involvement in *Wilson*. The questions are not necessarily identical. There may be facts in *Wilson* which were not relevant to *Bodily* but are important to the present action. The *Bodily* court's ruling on the disqualification motion decided that the relevant facts from *Wilson* did not affect the *Bodily* litigation significantly. However, the scope of the *Bodily* court's inquiry was not large enough to determine that the Howard firm's involvement in *Wilson* would not adversely impact other cases. The first part of our test for issue preclusion is thus not satisfied.

*Swainston*, 766 P.2d at 1061 (emphasis original); see also *West Bend Mut. Ins. Co. v. Berger*, 531 N.W.2d 636, 641 (Wis. App. 1995) (collateral estoppel only applies where controlling facts and legal rules remain unchanged).

Thus, in addition to differences between state and federal law, the *Swainston* Court recognized that differences in the relevant facts to be considered in the respective cases is an important consideration in determining whether

issue preclusion is applicable. In the case at bar, it is very clear that there were facts which were not only relevant but determinative in the bankruptcy court but which would be unimportant to the trial court and visa versa. As Ms. Hancock acknowledges, the determinative fact in the bankruptcy court was that Mr. Busch's obligation to pay the second mortgage "has the effect of providing support to [Ms. Hancock's] family." (R. 721 at page 6, line 5) Clearly, that fact would have little, if any, relevance to the issue which Mr. Busch asked the trial court to address in the case at bar. All of Mr. Busch's monetary obligations under the Decree of Divorce have the effect of providing support to Mr. Hancock's family. That fact, however, will not be helpful in determining whether Mr. Busch's obligation to pay the second mortgage was intended by the trial court to be in lieu of additional alimony or was simply intended to be part of the parties' property settlement. Further, under Utah law child support is determined by the guidelines set forth in Utah Code Ann. § 78-45-7.14. Section 78-45-7.14 was not relevant in the bankruptcy court.

That a different issue was decided by the bankruptcy court is also demonstrated by answering the question: why


did res judicata not bar the bankruptcy court from considering the issues decided in the Decree of Divorce? The Decree of Divorce was entered long before the bankruptcy court's involvement. The answer, of course, is that the Decree of Divorce did not determine the nature of Mr. Busch's obligation to pay the second mortgage for purposes of federal bankruptcy law. It is just as clear that the bankruptcy court was not concerned with the determining the nature of that obligation for state law purposes.

In short, the question which Mr. Busch asked the trial court to decide in the case at bar is not whether his obligation to pay the second mortgage was entitled to priority treatment under 11 U.S.C. section 1322(a)(2) or dischargeable under 11 U.S.C. section 523(a)(5). Rather, the question which Mr. Busch asked the trial court to decide is whether his obligation to pay the second mortgage was intended as additional alimony which terminated upon Ms. Hancock's remarriage. Because the two issues are not "precisely the same," the issue preclusion branch of res judicata is not applicable. *Schaer*, 657 P.2d at 1341.

### **CONCLUSION**

Based on the foregoing, Mr. Busch respectfully requests that the trial court's Orders denying his Motion for Order Clarifying Nature of Obligation and his Objection to Commissioner's Recommendation be reversed and that this case be remanded to the trial court for further proceedings consistent with this Court's decision.

DATED this 14<sup>th</sup> day of January, 2002.

  
\_\_\_\_\_  
Scott B. Mitchell  
Attorney for Appellant

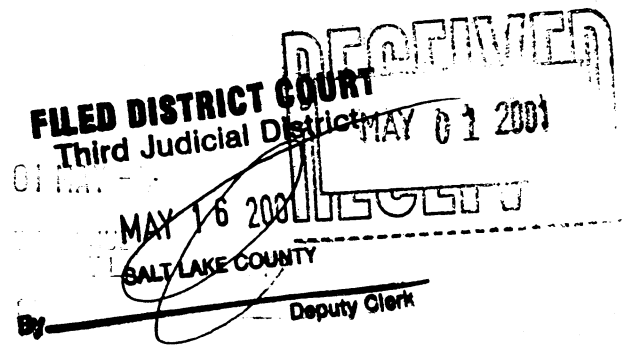
### **MAILING CERTIFICATE**

Undersigned certifies that two copies of the foregoing were mailed this 14<sup>th</sup> day of January 2002 via first class U.S. Mail, postage prepaid, to the following:

Steven C. Tycksen  
360 West 5300 South, Suite 360  
Murray, Utah 84123

  
\_\_\_\_\_

## Addendum 1



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8  
9 IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
10  
11 SALT LAKE COUNTY, STATE OF UTAH  
12

13  
14 CINDY A. BUSCH,  
15  
16 Plaintiff,

17 vs.

18 JAY BUSCH,  
19  
20 Defendant.

21 :  
22 : ORDER ON  
23 : DEFENDANT'S MOTION TO CLARIFY  
24 : DECREE & PLAINTIFF'S MOTION TO  
25 : DEFER HER OBLIGATION TO PAY  
26 : DEFENDANT'S EQUITY UNTIL HE HAS  
27 : SATISFIED THE SECOND MORTGAGE  
28 :  
29 : Civil No. 984908136  
30 : Judge Stirba  
31 : Commissioner Evans

32 The Defendant's Motion to Clarity Decree and Plaintiff's Motion to Defer her Obligation to  
33 Pay Defendant's Equity until he has satisfied the Second Mortgage came on for Hearing on Tuesday,  
34 April 24, 2001 at the hour of 9:00 a.m. before the Honorable Michael S. Evans, Domestic  
35 Commissioner. The Plaintiff was present in Court and represented by her attorney, Steven C.  
36 Tycksen. The Defendant was present in Court and represented by his attorney, Scott Mitchell.

37 The parties made legal argument to the Court through counsel, whereupon the Commissioner

1 made a recommendation for an Order.. The Court having reviewed the recommendation, the file and  
2 legal memoranda, and for good cause therein appearing, does now hereby:

3 **ORDER , ADJUDGE AND DECREE** as follows:

4 1. The Court Finds that the Bankruptcy Court exercised its concurrent jurisdiction in the  
5 Defendant's bankruptcy case and found that the Defendant's obligation to pay the second mortgage  
6 was a debt that was in the nature of support and was therefore non-dischargeable.

7 2. In view of that ruling it is the opinion of this Court that the issue now sought to be brought  
8 before this Court in Defendant's Motion is, in fact, Res Judicata because of Judge Clark's ruling on  
9 the same issue.

10 3. The Court therefore declines to rule further on the matter.

11 4. The Defendant's Motion to Clarify the Decree is therefore denied.

12 5. The Court finds that the Defendant's obligation to pay the second mortgage is a reasonable  
13 pre-condition to his right to receive his equity in the marital home and orders therefore that the  
14 Plaintiff's obligation to pay Defendant his equity in the marital home shall be deferred until he has  
15 satisfied the second mortgage in full.

16 DATED this 16th day of April, 2000. *may*

17  
18  
19  
20  
21 **RECOMMENDED:**

22 *Michael S. Evans* 5/15/01  
23 Michael S. Evans, Domestic Commissioner

BY THE COURT  
SALT LAKE COUNTY DISTRICT COURT  
Anne Strba, District Court Judge

APPROVED AS TO FORM:

*Scott Mitchell*  
Scott Mitchell, Attorney for the Defendant

## Addendum 2



**FILED DISTRICT COURT**  
Third Judicial District

AUG 27 2001

SALT LAKE COUNTY

By \_\_\_\_\_  
Deputy Clerk

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2 **Zoll & Tycksen, L.C.**  
3 **Attorneys for Petitioner**  
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7 **Facsimile: (801) 685-7808**

8 **IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR**  
9 **SALT LAKE COUNTY, STATE OF UTAH**

---

10 **CINDY A. BUSCH,**

11 **Plaintiff,**

12 **vs.**

13 **JAY BUSCH,**

14 **Defendant.**

:

:

:

:

:

**ORDER ON**  
**DEFENDANT'S OBJECTION**  
**TO COMMISSIONER'S**  
**RECOMMENDATION**

**Civil No. 984908136**  
**Judge Bruce Lubeck**  
**Commissioner Evans**

---

17 The Defendant's Objection to the Commissioner's Recommendation made  
18 by Commissioner Michael Evans during a Hearing held in this matter on April  
19 24, 2001 came on regularly for oral argument before the Honorable Bruce  
20 Lubeck, District Court Judge on August 14, 2001. The Plaintiff was represented  
21 by Steven C. Tycksen, but did not appear personally. The Defendant was  
22 present in Court and was represented by Scott Mitchell, Esq. The Court heard  
23 argument of counsel and having reviewed the memoranda and moving papers  
24  
25  
26

1 and being otherwise fully advised in the premises does now hereby

2 **ORDER, ADJUDGE AND DECREE** as follows:

- 3 1. The Defendant's Objection to the Commissioner's  
4 Recommendation is overruled.  
5 2. The Commissioner's Recommendation is sustained and  
6 upheld by the Court.

7 **DATED this 27<sup>th</sup> day of August, 2001.**

8  
9 **BY THE COURT:**

0  
1  **Bruce Lapeck, District Court Judge**

2 **Approved as to Form:**

3   
4 **Scott Mitchell, Attorney for the Defendant**  
5  
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